SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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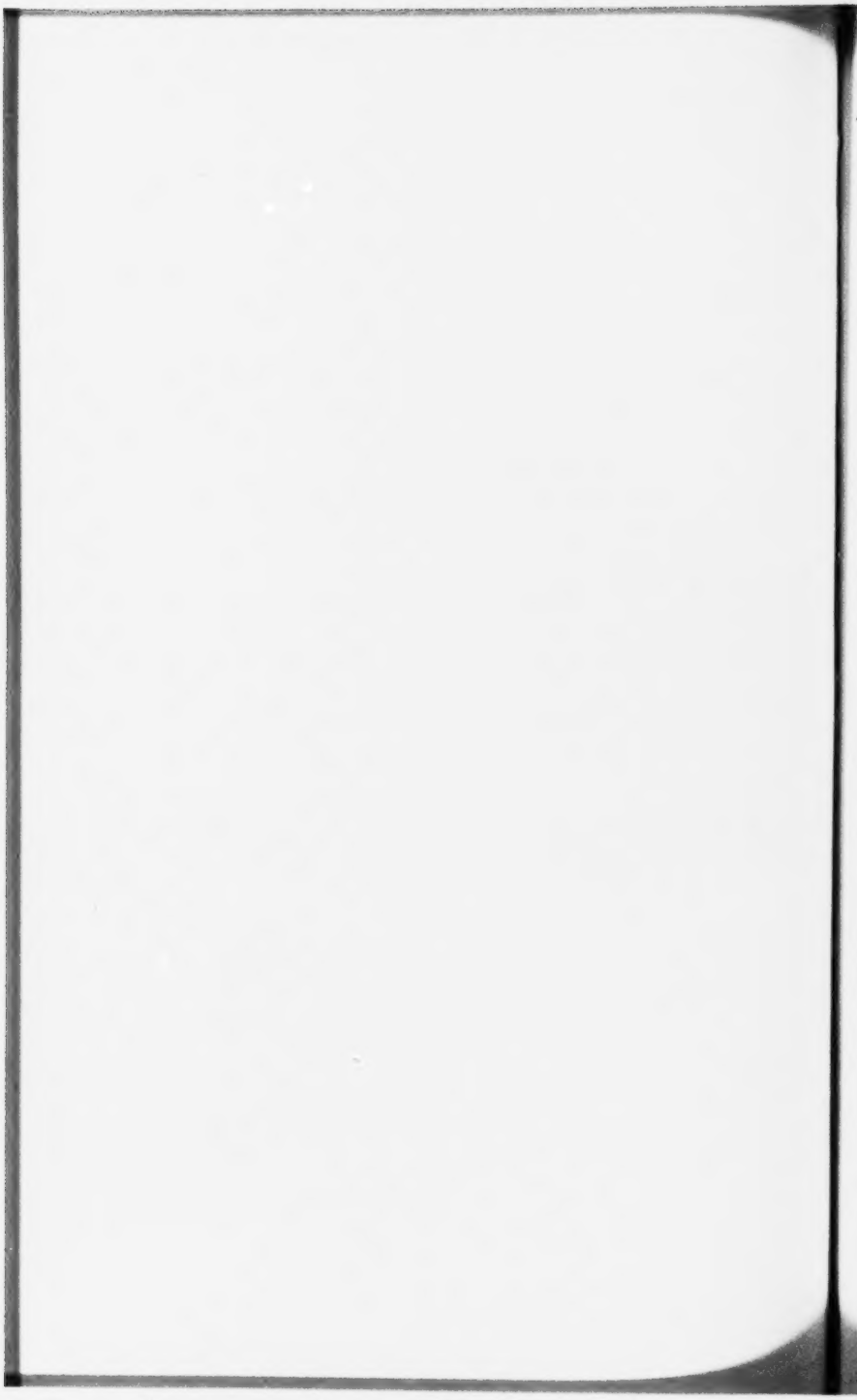

SUPREME COURT OF THE UNITED STATES

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No. 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, ET AL.

APPEAL FROM THE SUPREME COURT OF TEXAS, AT AUSTIN, TEXAS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Appellees, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, John Ben Shepperd, Attorney General of the State of Texas and Jesse James, State Treasurer of the State of Texas, believing that the matters set forth below will demonstrate the lack of substance in the question raised by this appeal, file this statement in opposition to appellant's statement as to jurisdiction.

Appellees include herein their motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, on the ground that the federal question relied

upon by appellant is unsubstantial in character, in that the question urged for reversal has been plainly foreclosed by prior decisions of the Supreme Court.

The Federal Question Is Unsubstantial

The United States Supreme Court has consistently recognized the following proposition of law which governs this appeal:

> Although a person is engaged solely in interstate commerce, a State may validly levy a non-discriminatory tax upon a local incident or activity of the interstate business, which is separate and apart from the actual flow of commerce, provided the taxpayer is receiving from the State levying the tax, benefits, protection or opportunities which bear a fiscal relationship to the tax. *Memphis Gas Company* v. *Stone,* 335 U.S. 80 (1948); *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435 (1940); *Freeman* v. *Hewit,* 329 U.S. 249 (1946); *Spector Motor Service* v. *O'Connor,* 340 U.S. 602 (1951).

The Supreme Court stated in an opinion by Mr. Justice Reed in the *Memphis Gas Company* case:

> "We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. *This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business.*" 335 U.S. at p. 96.

The dissent by Mr. Justice Frankfurter, joined by Mr. Chief Justice Vinson, Mr. Justice Jackson and Mr. Justice Burton, recognized that a State could validly levy a tax

upon a local incident although a part of interstate commerce, when the taxing power exerted by the State bears fiscal relation to privileges, opportunities and benefits given by the State, but dissented on the ground that "The record is barren of any indication that 'the taxing power exerted by the State bears fiscal relation to protection, opportunities, and benefits given by the State,' Wisconsin v. J. C. Penney . . ." 335 U.S. at p. 100.

The tax in question is not levied upon the privilege of engaging in interstate commerce. The operating incidence of the tax as found by the State courts is: " . . . In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant."

The opinion of the Texas courts further stated: "That the gathering of gas, so defined, is a local activity within the State of Texas and not subject to repetition elsewhere is apparent and since appellees do not allege the statute to be discriminatory, . . ." *Calvert* v. *Panhandle Eastern Pipe Line Company*, 255 S. W. 2d 535. Page 39 of Appellant's "Statement as to Jurisdiction," in Case No. 198, October Term, 1953.

Benefits, Protection and Opportunities Afforded by the State of Texas

The undisputed and unchallenged evidence adduced upon the trial of this cause takes from appellant the aegis of the "commerce clause."

(a) This evidence discloses that the very economic existence of appellant is dependent upon the privileges,

benefits and opportunities afforded by the State of Texas in the enforcement of its oil and gas conservation laws. Such evidence shows that the enforcement of such conservation laws has made it economically possible for appellant to be in business and makes it possible for it to remain in business for many years to come. From the evidence it is undisputed that if such oil and gas conservation laws were repealed, or there was no enforcement of such laws, those engaged in the transmission of gas would lose their investments; and the recently built pipe lines which have not been paid out could never be amortized. In addition, there would be a great deal of suffering on the part of the consumers of such gas in that their source of supply would last but a short period of time (S. F. 84-86).

(b) The State of Texas exercises control and jurisdiction over the drilling, completing and production of oil and gas wells and over the plants that extract gasoline or other liquid hydrocarbons from gas; and neither the Congress of the United States, the Federal Power Commission nor any other Federal agency has by any law, rule or regulation exercised any control or jurisdiction over such activities (Michigan-Wisconsin, S. F. 34-35).

(c) One of the primary functions of the Railroad Commission of Texas in the enforcement of the Texas Oil and Gas Conservation statutes is to assure to the consumers of gas, in both interstate and intrastate commerce, an adequate supply of gas to supply their demands (Michigan-Wisconsin, S. F. 46). One of the means by which this is accomplished is the practice of allowing the purchasers of gas to make "nominations." Mr. Murray, a petroleum engineer by profession and a member of the Railroad Commission, testified in reference thereto as follows: "I consider the right to make nominations an extremely valuable privilege to the gas purchasers, so valuable that I don't think they could operate without that privilege." He further stated in substance that the Texas Railroad Commission has the arduous task of administering the practice of nominations (Michigan-Wisconsin, S. F.

151). This testimony is uncontradicted and unchallenged.

(d) The Texas Legislature has enacted Article 6408-14, V. C. S., known as the "over and under six months balancing provision", for the special benefit of appellant and other pipe line companies. Mr. Murray testified in reference thereto as follows: ". . . the Legislature specifically for the benefit of the pipe lines passed an over and under six months balancing provision. . . affording these various pipe lines serving a single field the ability to get gas whenever their particular customers demand it and I do consider that a very valuable right and privilege to the gas companies" (Michigan-Wisconsin S. F. pp. 78-79).

(e) The Texas gas conservation laws culminated in maximum benefits to appellant and other pipe line companies at the outlet of the gasoline plants, (Michigan-Wisconsin, S. F. 85) at which point this appellant consummates its purchase of the gas.

(f) The Texas Legislature exempted from the tax gas taken or retained for the manufacture of carbon black. The manufacturers of carbon black do not receive the benefits from the conservation statutes. In fact, the conservation statutes are putting them out of business (Mr. Murray's testimony; Michigan-Wisconsin, S. F. 142-148). So it is evident that the legislature in passing this taxing act, did so for the purpose of requiring those who receive the benefits of our gas conservation statutes to pay their way and exempted those who do not receive such benefits.

The Court of Civil Appeals in this case found from the above undisputed evidence as well as other evidence in the record that the tax levied by Article 7057f is "fairly commensurate with the protection and benefits conferred by the State upon those engaged in the occupation described." 255 S. W. 2d at page 546; page 42 of Appellant's "Statement as to Jurisdiction," in Case No. 198, October Term, 1953.

There is no possibility of discrimination against interstate commerce under Article 7057f, either on the face of the statute or in its practical operation. The tax is placed upon the privilege of engaging in the business of taking or retaining possession of the gas for transmission, a local activity; and such tax is measured by the amount of gas taken or retained. The incidence and amount of the tax are in no way governed by a determination of whether the gas will be transmitted in intra or interstate commerce, or whether it is taken or retained for further processing. The stipulations show that approximately forty per cent of the revenue from this tax comes from those taking or retaining possession of gas for intrastate consumption (Michigan-Wisconsin, S. F. 39).

Likewise, there is no possibility of the same activity taxed by the State of Texas being validly taxed by other states, thus giving rise to a "multiple burden" on interstate commerce which again would have the effect of unduly burdening that commerce. *Gwin, White, Prince v. Henneford,* 305 U. S. 434 (1939).

The activity taxed by the State of Texas is conditioned upon the gas being produced in Texas, and is the "*first* taking or retaining" of possession within this State after processing within this State. Neither the production nor the "first taking or retaining" of possession has any relationship to any other State which would give rise to this same tax by another State.

Further, the tax must not be an undue burden on interstate commerce. Appellees admitted in open court upon trial of these cases that there was no undue burden, except to the extent that any tax placed directly upon interstate commerce is an undue burden.

The tax was not challenged upon the ground that there is no proper ratio between the amount of the tax and the

protection, benefits and opportunities afforded by this State. The tax is a revenue tax, and has not been challenged as an attempt to place an embargo on interstate commerce. Finally, there has been and could be no contention that the State of Texas has no real interest in the subject matter here involved. Certainly the State of Texas has a vital interest in requiring each and every segment of her economy to share the burden of the cost of State government.

WHEREFORE, Appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the decree of the Supreme Court of Texas heretofore entered herein.

Respectfully,

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W. V. GEPPERT,
Assistant Attorney General,
C. K. RICHARDS,
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Attorneys for Appellees.